IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Patent Application of

TOTAKA et al

Serial No. 10/825,200

Filed: April 16, 2004

Atty. Ref.: 723-1505

TC/A.U.: 3714

Examiner: Torimiro, Adetokunbo Olusegun

For: GAME BGM GENERATING METHOD AND GAME APPARATUS

* *

May 27, 2009

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF

Sir:

Appellant hereby **appeals** to the Board of Patent Appeals and Interferences from the last decision of the Examiner.

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(I)   __REAL PARTY IN INTEREST__

The real party in interest is Nintendo Co., Ltd., a corporation of the country of

Japan.

(II)   <u>RELATED APPEALS AND INTERFERENCES</u>

The appellant, the undersigned, and the assignee are not aware of any related

appeals, interferences, or judicial proceedings (past or present), which will directly affect

or be directly affected by or have a bearing on the Board's decision in this appeal.

(III) STATUS OF CLAIMS

Claims 1-3, 5-10, and 12-16 are pending and have been rejected. Claims 4 and 11 previously were cancelled. No claims have been substantively allowed. The rejections of claims 1-3, 5-10, and 12-16 are being appealed.

(IV)   <u>STATUS OF AMENDMENTS</u>

No amendments have been filed since the date of the Final Rejection.

(V) SUMMARY OF CLAIMED SUBJECT MATTER

A listing of each independent claim, each dependent claim argued separately and each claim having means plus function language is provided below including exemplary reference(s) to page and line number(s) of the specification.

Claim 1. A game apparatus (e.g., 12 in Figs. 1 and 2; p. 11, line 6 to p. 16, line 5) operable to execute a game BGM generating program (e.g., 70d in Fig. 3; p. 17, lines 1-2) stored on a storage medium (e.g., 18 in Figs. 1 and 2; 40 in Fig. 3; p. 11, lines 12-15; p. 16, lines 6-14),

said game apparatus comprising (e.g., 12 in Figs. 1 and 2; p. 11, line 6 to p. 16, line 5):

a phrase data storage area (e.g., 76 in Fig. 3 and 770 in Fig. 6(A); p. 19, line 5 to p. 21, line 2) that stores different kinds of a plurality of phrase data (e.g., Phrase A-D Data in Fig. 6(A); p. 19, line 5 to p. 21, line 2), based on a musical characteristic, wherein said phrase data designate a length and a pitch of a pronunciation of a tone color;

a rhythm-pattern storage area (e.g., 78 in Figs. 3 and 6(B); p. 21, line 3 to p. 22, line 15) that stores at least one kind of rhythm pattern data (e.g., Rhythm Groups 1 and 2 in Fig. 6(B) ; p. 21, line 3 to p. 22, line 15), constructed of rhythm data, that designate a length in performance for performing a phrase, and a timing of said phrase;

BGM-data reproducing programmed logic circuitry that reproduces BGM data constructed of at least one part (e.g., step S113 in Fig. 13, p. 42, line 23 to p. 43, line 1);

a tone storage area that stores data of a sound output according to said

BGM data (e.g., musical notes in Fig. 6(A); p. 3, line 23 to p. 4, line 3; p. 19, line 22 to p.

20, line 2);

a continuous counter for counting the number of times the same phrase has

been selected (e.g., 82d in Fig. 3; p. 23, lines 18-22); and

sound outputting programmed logic circuitry that outputs a sound

according to the BGM data reproduced by said BGM-data reproducing programmed logic

circuitry (e.g., 62 and 34a in Fig. 2; p. 15, lines 19-22), wherein

said game BGM generating program (e.g., 70d in Fig. 3; p. 17, lines 1-2) is

capable of being executed by a processor (e.g., 36 in Fig. 2; p. 13, lines 18-23) of said

game apparatus (e.g., 12 in Figs. 1 and 2; p. 11, line 6 to p. 16, line 5) to perform the

steps of:

randomly selecting one kind of the phrase data stored in said phrase data

storage area (e.g., step S91 in Fig. 12; p. 36, line 24 to p. 37, line 7) including

incrementing said continuous counter (e.g., step S95 in Fig. 12; p. 37, lines 8-20) when

the phrase data selected last time and the phrase data selected this time agree (e.g., step

S95 in Fig. 12; p. 37, lines 8-20) and re-selecting the phrase data when a count value of

said continuous counter is larger than a predetermined value (e.g., YES from step S97 in

Fig. 12; p. 37, lines 8-20);

selecting one rhythm data (e.g., step S59 in Fig. 10; p. 34, lines 4-14) from

one kind of the rhythm pattern data (e.g., Rhythm Groups 1 and 2 in Fig. 6(B) ; p. 21, line

3 to p. 22, line 15) stored in said rhythm-pattern storage area (e.g., 78 in Figs. 3 and 6(B);

p. 21, line 3 to p. 22, line 15) according to a predetermined rule; and

generating the BGM data (e.g., step S113 in Fig. 13, p. 42, line 23 to p. 43,

line 1) from the phrase data selected by said randomly selecting one kind of the phrase

(e.g., step S91 in Fig. 12; p. 36, line 24 to p. 37, line 7) and the rhythm data selected by

said selecting one kind of rhythm data (e.g., step S59 in Fig. 10; p. 34, lines 4-14).

Claim 5. A game apparatus (e.g., 12 in Figs. 1 and 2; p. 11, line 6 to p. 16, line 5)

according to claim 1, further comprising at least one operating control that inputs an

operation from a player (e.g., 22 in Figs. 1 and 2; p. 11, line 20 to p. 12, line 14); and

performance-change data storage area that stores performance-change data that

changes a performing method of a BGM (e.g., 70g in Fig. 3; p. 5, line 22 to p. 6, line 21),

wherein said game BGM generating program (e.g., 70d in Fig. 3; p. 17, lines 1-2) is

capable of being executed by said (e.g., 36 in Fig. 2; p. 13, lines 18-23) of said game

apparatus (e.g., 12 in Figs. 1 and 2; p. 11, line 6 to p. 16, line 5) to further perform the

steps of:

storing performance-change data corresponding to at least the operation of

said at least one operating control (e.g., 22 in Figs. 1 and 2; p. 11, line 20 to p. 12, line

14) in said performance-change data storage area (e.g., 70g in Fig. 3; p. 5, line 22 to p. 6,

line 21); and

applying a predetermined change to said BGM data, corresponding to the performance-change data, stored in said performance-change data storage area by said storing performance-change data (e.g., 70g in Fig. 3; p. 5, line 22 to p. 6, line 21).

Claim 6. A game apparatus (e.g., 12 in Figs. 1 and 2; p. 11, line 6 to p. 16, line 5) according to claim 5, wherein,

applying a predetermined change includes changing a tempo of said BGM data according to said performance-change data (e.g., 70g in Fig. 3; p. 5, line 22 to p. 6, line 21).

Claim 8. A game BGM generating method (e.g., 70d in Fig. 3; p. 17, lines 1-2) of a game apparatus (e.g., 12 in Figs. 1 and 2; p. 11, line 6 to p. 16, line 5) provided with a phrase data storage area (e.g., 76 in Fig. 3 and 770 in Fig. 6(A); p. 19, line 5 to p. 21, line 2) that stores different kinds of a plurality of phrase data (e.g., Phrase A-D Data in Fig. 6(A); p. 19, line 5 to p. 21, line 2), based on a musical characteristic, wherein said phrase data designate a length and a pitch of a tone,

a rhythm-pattern storage area (e.g., 78 in Figs. 3 and 6(B); p. 21, line 3 to p. 22, line 15) that stores at least one kind of rhythm pattern data (e.g., Rhythm Groups 1 and 2 in Fig. 6(B) ; p. 21, line 3 to p. 22, line 15) constructed of rhythm data that designate a length in performance for performing a phrase, and a timing of said phrase;

BGM-data reproducing programmed logic circuitry that reproduces BGM data constructed of at least one part (e.g., step S113 in Fig. 13, p. 42, line 23 to p. 43, line 1);

a tone storage area that stores data of a sound, output according to said BGM data (e.g., musical notes in Fig. 6(A); p. 3, line 23 to p. 4, line 3; p. 19, line 22 to p. 20, line 2);

a continuous counter for counting the number of times the same phrase has been selected (e.g., 82d in Fig. 3; p. 23, lines 18-22); and

sound outputting programmed logic circuitry (e.g., 62 and 34a in Fig. 2; p. 15, lines 19-22) for outputting the sound according to the BGM data reproduced by said BGM-data reproducing programmed logic circuitry (e.g., step S113 in Fig. 13, p. 42, line 23 to p. 43, line 1), said game BGM generating method comprising:

(a) randomly selecting one kind of the phrase data stored in said phrase data storage area (e.g., step S91 in Fig. 12; p. 36, line 24 to p. 37, line 7) including incrementing said continuous counter (e.g., step S95 in Fig. 12; p. 37, lines 8-20) when the phrase data selected last time and the phrase data selected this time agree (e.g., step S95 in Fig. 12; p. 37, lines 8-20) and re-selecting the phrase data when a count value of said continuous counter is larger than a predetermined value (e.g., YES from step S97 in Fig. 12; p. 37, lines 8-20);

(b) selecting one rhythm data from one kind of the rhythm pattern data (e.g., step S59 in Fig. 10; p. 34, lines 4-14) stored in said rhythm-pattern storage area (e.g., 78 in Figs. 3 and 6(B); p. 21, line 3 to p. 22, line 15); and

(c) generating the BGM data from the phrase data selected by said step (a) and the rhythm data selected by said step (b) (e.g., step S113 in Fig. 13, p. 42, line 23 to p. 43, line 1).

Claim 9. A game apparatus (e.g., 12 in Figs. 1 and 2; p. 11, line 6 to p. 16, line 5) that performs a BGM corresponding to at least a proceeding situation of a game (e.g., 70d in Fig. 3; p. 17, lines 1-2), comprising:

a phrase data storage area (e.g., 76 in Fig. 3 and 770 in Fig. 6(A); p. 19, line 5 to p. 21, line 2) that stores different kinds of a plurality of phrase data (e.g., Phrase A-D Data in Fig. 6(A); p. 19, line 5 to p. 21, line 2), based on a musical characteristic, wherein said phrase data designate a length and a pitch of a tone;

a rhythm-pattern storage area (e.g., 78 in Figs. 3 and 6(B); p. 21, line 3 to p. 22, line 15) that stores at least one kind of rhythm pattern data (e.g., Rhythm Groups 1 and 2 in Fig. 6(B) ; p. 21, line 3 to p. 22, line 15), constructed of rhythm data, that designate a length in performance for performing a phrase and a timing of said phrase;

BGM-data reproducing programmed logic circuitry that reproduces BGM data constructed of at least one part (e.g., step S113 in Fig. 13, p. 42, line 23 to p. 43, line 1);

a tone storage area that stores data of a sound output according to said BGM data (e.g., musical notes in Fig. 6(A); p. 3, line 23 to p. 4, line 3; p. 19, line 22 to p. 20, line 2);

a continuous counter for counting the number of times the same phrase has been selected (e.g., 82d in Fig. 3; p. 23, lines 18-22);

phrase selecting programmed logic circuitry that randomly selects one kind of the phrase data stored in said phrase data storage area (e.g., step S91 in Fig. 12; p. 36, line 24 to p. 37, line 7) including incrementing said continuous counter (e.g., step S95 in Fig. 12; p. 37, lines 8-20) when the phrase data selected last time and the phrase data selected this time agree (e.g., step S95 in Fig. 12; p. 37, lines 8-20) and re-selecting the phrase data

when a count value of said continuous counter is larger than a predetermined value (e.g.,

YES from step S97 in Fig. 12; p. 37, lines 8-20);

rhythm-pattern selecting programmed logic circuitry that selects one rhythm data

from one kind of the rhythm pattern data (e.g., step S59 in Fig. 10; p. 34, lines 4-14)

stored in said rhythm-pattern storage area (e.g., 78 in Figs. 3 and 6(B); p. 21, line 3 to p.

22, line 15) according to a predetermined rule;

BGM generating programmed logic circuitry (e.g., step S113 in Fig. 13, p. 42, line

23 to p. 43, line 1) that generates said BGM data from the phrase data selected by said

phrase selecting programmed logic circuitry (e.g., step S91 in Fig. 12; p. 36, line 24 to p.

37, line 7) and the rhythm data selected by said rhythm-pattern selecting programmed

logic circuitry (e.g., step S59 in Fig. 10; p. 34, lines 4-14), and

sound outputting programmed logic circuitry (e.g., 62 and 34a in Fig. 2; p. 15,

lines 19-22) that outputs the sound according to the BGM data reproduced by said BGM-

data reproducing mechanism (e.g., step S113 in Fig. 13, p. 42, line 23 to p. 43, line 1).

Claim 10. A method for generating a sequence of BGM (e.g., 70d in Fig. 3; p. 17,

lines 1-2), comprising the steps of:

providing at least one set of rhythm data (e.g., 78 in Figs. 3 and 6(B), step S59 in

Fig. 10; p. 21, line 3 to p. 22, line 15, p. 34, lines 4-14);

providing at least one set of phrase data (e.g., 76 in Fig. 3 and 770 in Fig. 6(A),

Phrase A-D Data in Fig. 6(A); p. 19, line 5 to p. 21, line 2);

selecting a set of rhythm data from the at least one set of rhythm data (e.g., step S59 in Fig. 10; p. 34, lines 4-14);

selecting a set of phrase data from the at least one set of phrase data (e.g., step S91 in Fig. 12; p. 36, line 24 to p. 37, line 7);

counting the number of times the currently selected set of phrase data has been continuously selected (e.g., 82d in Fig. 3, step S95 in Fig. 12; p. 23, lines 18-22, p. 37, lines 8-20);

re-selecting a new set of phrase data if the currently selected phrase data has been continuously selected more than a predetermined number of times (e.g., YES from step S97 in Fig. 12; p. 37, lines 8-20), and

generating BGM data from the selected rhythm data and the selected phrase data (e.g., step S113 in Fig. 13, p. 42, line 23 to p. 43, line 1).

(VI)   GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

First, whether claims 1-3, 7-10, and 12-16 are "obvious" over Crowley (U.S. Patent No. 6,096,962) in view of Koguchi (U.S. Patent No. 5,148,419) and Shuster (U.S. Patent No. 6,270,409) under 35 U.S.C. § 103(a).

Second, whether claims 5 and 6 are "obvious" over Crowley in view of Koguchi and Shuster and further in view of Ishikawa et al. (U.S. Publication No. 2001/0016510) under 35 U.S.C. §103(a).

(VII) ARGUMENT

A. Claims 1-3, 7-10, and 12-16 Are Not "Obvious" over Crowley in view of Koguchi and Shuster.

Claims 1-3, 7-10, and 12-16 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Crowley (U.S. Patent No. 6,096,962) in view of Koguchi (U.S. Patent No. 5,148,419) and Shuster (U.S. Patent No. 6,270,409). This three-way Section 103 rejection is erroneous and should be reversed for at least the following reasons.

Applicant previously pointed out that the alleged combination of references does not teach or suggest "incrementing said continuous counter when the phrase data selected last time and the phrase data selected this time agree and reselecting the phrase data when a count value of said continuous counter is larger than a predetermined value." This limitation is recited in claims 1 and 8-9, and a similar claim limitation appears in claim 10. In this regard, Applicant also noted that Shuster does not increment a counter in the same manner as that which is claimed. In particular, Shuster increments its counter when any non-winning combination is reached, notwithstanding the results of the previous play. Furthermore, when two winning combinations are achieved in a row, the counter of Shuster is not incremented. Accordingly, Shuster does not teach or suggest that a counter is incremented based on a previous selection in the claimed manner. Perhaps more fundamentally, Shuster is completely silent regarding incrementing, decrementing, resetting, or doing any other operation in response to specifically claimed phrase data. Shuster is unrelated to the above-quoted claim limitations, and thus the alleged

combination of references fails to render obvious claims 1 and 8-10 (an also their respective dependents).

The "Response to Arguments" section on pages 8-9 of the Final Office Action provides some insight into the interpretation being given to certain terms in the above-quote (and other related) claim recitations. First, this section of the Final Office Action indicates that the term "phrase data" recited in the claims has been broadly interpreted, such that the claimed "phrase data" has been interpreted to include "a non-winning combination." Although claims are to be given their broadest reasonable interpretation during prosecution before the USPTO, Applicant respectfully submits that this interpretation is so broad as to be erroneous in view of the explicit language of the claims themselves. Indeed, claim 1 expressly states that the phrase data designates a length and a pitch of a pronunciation of a tone color. This is an explicit definition of the term "phrase data" provided within the claims themselves, and the term must be interpreted in a manner consistent with this express definition. The specifically claimed phrase data has absolutely nothing to do with winning or non-winning combinations in a gambling system. Thus, the "interpretation" advanced in the Final Office Action is completely unrelated to the language that clearly and explicitly appears in the claims. Although the Advisory Action seems to disagree with Applicant's position, it does little to cogently explain how a winning or non-winning combination in a gambling system at all relates to a length and a pitch of a pronunciation of a tone color.

Second, although the "logic" is somewhat difficult to follow, the Final Office Action appears to be arguing that Shuster teaches resetting its counter after every non-

winning combination. However, once again, the claims are unrelated to <u>resetting</u> and, in any case, Applicant respectfully submits that this argument is inapposite to the <u>incrementing</u> features of the claims.

The Advisory Action (much belatedly) states that "it will [be] obvious for winning combinations to be counted and incremented everytime [sic] a winning combination occurs since the game system keeps record of the amount of times the game as been played via the counter." To the extent that this statement can be understood and is even tangentially related to the invention defined by the claims, Applicant respectfully points out that it constitutes clear legal error, inasmuch as the obviousness determination is to be made at the time of the invention. The Advisory Action's statement that it "will [be] obvious" is particularly telling of improper ex post claim reconstruction. Even the most incredible reading of *KSR* does not permit this kind of hindsight "reasoning." Furthermore, to the extent that this statement can, or needs to be, addressed "on the merits," Applicant respectfully notes that such reasoning -- i.e., incrementing a counter for accounting purposes in the context of a casino's gambling machine -- has absolutely nothing whatsoever to do with incrementing a counter based upon selected phrase data when generating background music (BGM).

Notwithstanding the erroneous interpretations advanced during the prosecution of this application, the numerous factual errors, and the fact that the Examiner still has failed to identify where each and every limitation of the claims is to be found in the alleged combination of prior art references, Applicant also has repeatedly pointed out that the Examiner has failed to explain <u>why</u> one of ordinary skill in the art at the time of the

invention would have combined the various references. The Office Action dated April 8, 2008 does note that "one would be motivated to [make the combination] to have a complete sound database and a system whereby there is a count of the amount of data selected from the database." As Applicant pointed out, one of ordinary skill in the art at the time of the invention arguably might have been motivated to develop a complete sound database, and one of ordinary skill in the art at the time of the invention arguably might also have been motivated to keep a count of the amount of data selected from such a database. However, the alleged Crowley/Koguchi/Shuster three-way combination would not lead to such a count being made at all, at least insofar as the counting techniques of Shuster relied upon by in the 4/8/2008 Office Action actually relate to keeping track of losses and forcing wins within a single gambling session rather than to keeping count of the data selected from a database -- much less keeping fresh the supply of background music in a game, as claimed.

The response in the Final Office Action, however, is largely incomprehensible, as it consists of un-grammatical fragments of thoughts that are unrelated to maintaining a sound database (which was the alleged motivation) or anything at all that Applicant actually has claimed. Such clearly falls short of the requirement for a clearly articulated basis for why one of ordinary skill in the art at the time of the invention would have made the alleged combination. The language in the Final Office Action certainly is insufficient to support the legal conclusion of obviousness.

In a third attempt to articulate some semblance of a reason to combine the references, the Advisory Action incredibly belatedly "explains" that "the motivation for

combining the references is so that the game system will have [a] counter and a criteria for the system to carry out the increment via the counter." Exactly why any of the other cited references would need a counter (which, in any event, does not increment in the manner that one would expect a conventional counter to increment, as shown above) apparently is left to Applicant's imagination. In the context of irrelevant prior art, erroneous interpretations, and strained purported "teachings" from such irrelevant prior art extracted to meet such erroneous interpretations, it is perhaps not all that surprising that the Examiner has yet to explain exactly why one of ordinary skill in the art would have been combined the references at the time of the invention -- much less how that resulting combination would teach or suggest each and every feature of Applicant's claims.

Given the numerous fundamental deficiencies with the alleged combination of references discussed herein and previously presented, along with the absence of any reasoning to support the legal conclusion of obviousness, Applicant respectfully requests that this outstanding Section 103 rejection be reversed.

B. Claims 5-6 Are Not "Obvious" over Crowley in view of Koguchi and Shuster, in further view of Ishikawa.

Claims 5 and 6 stand rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over Crowley in view of Koguchi and Shuster and further in view of Ishikawa et al. (U.S. Patent Publication No. US 2001/0016510). This rejection is erroneous and should be reversed for at least the following reasons. Numerous

fundamental deficiencies with the alleged combination of references have been discussed

above. The introduction of Ishikawa, even if appropriate (which Applicant in any event

does not admit) fails to make up for these fundamental deficiencies. Thus, Applicant

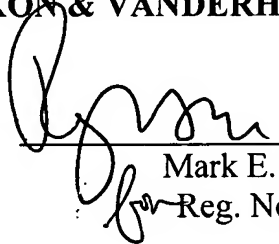respectfully requests that this Section 103 rejection be reversed.

CONCLUSION

In conclusion it is believed that the application is in clear condition for allowance;

therefore, early reversal of the Final Rejection and passage of the subject application to

issue are earnestly solicited.

Respectfully submitted,

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(VIII)   <u>CLAIMS APPENDIX</u>

1. A game apparatus operable to execute a game BGM generating program stored on a storage medium,

said game apparatus comprising:

a phrase data storage area that stores different kinds of a plurality of phrase data, based on a musical characteristic, wherein said phrase data designate a length and a pitch of a pronunciation of a tone color;

a rhythm-pattern storage area that stores at least one kind of rhythm pattern data, constructed of rhythm data, that designate a length in performance for performing a phrase, and a timing of said phrase;

BGM-data reproducing programmed logic circuitry that reproduces BGM data constructed of at least one part;

a tone storage area that stores data of a sound output according to said BGM data;

a continuous counter for counting the number of times the same phrase has been selected; and

sound outputting programmed logic circuitry that outputs a sound according to the BGM data reproduced by said BGM-data reproducing programmed logic circuitry, wherein

said game BGM generating program is capable of being executed by a processor of said game apparatus to perform the steps of:

randomly selecting one kind of the phrase data stored in said phrase data storage area including incrementing said continuous counter when the phrase data selected last time and the phrase data selected this time agree and re-selecting the phrase data when a count value of said continuous counter is larger than a predetermined value;

selecting one rhythm data from one kind of the rhythm pattern data stored in said rhythm-pattern storage area according to a predetermined rule; and

generating the BGM data from the phrase data selected by said randomly selecting one kind of the phrase and the rhythm data selected by said selecting one kind of rhythm data.

2. A game apparatus according to claim 1, wherein

said selecting one kind of rhythm includes randomly selecting the rhythm data from one kind of said rhythm pattern data.

3. A game apparatus according to claim 1, wherein

said rhythm selecting step includes sequentially selecting the rhythm data from one kind of said rhythm pattern data in predetermined order.

5. A game apparatus according to claim 1, further comprising at least one operating control that inputs an operation from a player; and

performance-change data storage area that stores performance-change data that changes a performing method of a BGM, wherein said said game BGM generating

program is capable of being executed by said processor of said game apparatus to further

perform the steps of:

storing performance-change data corresponding to at least the operation of

said at least one operating control in said performance-change data storage area; and

applying a predetermined change to said BGM data, corresponding to the

performance-change data, stored in said performance-change data storage area by said

storing performance-change data.

6. A game apparatus according to claim 5, wherein,

applying a predetermined change includes changing a tempo of said BGM data

according to said performance-change data.

7. A game apparatus according to claim 1, further comprising a period

designating data storage area that stores period designating data that designates a

performing period and a performance suspended period of the phrase, wherein

said BGM-data reproducing programmed logic circuitry suspends a reproduction

of the BGM data in the performance suspended period based on said period designating

data, and

allows said processor to execute the step of counting the performing period and

the performance suspended period designated by said period designating data, by the

number of times the rhythm data has been selected.

8. A game BGM generating method of a game apparatus provided with a phrase data storage area that stores different kinds of a plurality of phrase data, based on a musical characteristic, wherein said phrase data designate a length and a pitch of a tone ,

a rhythm-pattern storage area that stores at least one kind of rhythm pattern data constructed of rhythm data that designate a length in performance for performing a phrase, and a timing of said phrase;

BGM-data reproducing programmed logic circuitry that reproduces BGM data constructed of at least one part;

a tone storage area that stores data of a sound, output according to said BGM data;

a continuous counter for counting the number of times the same phrase has been selected; and

sound outputting programmed logic circuitry for outputting the sound according to the BGM data reproduced by said BGM-data reproducing programmed logic circuitry, said game BGM generating method comprising:

(a) randomly selecting one kind of the phrase data stored in said phrase data storage area including incrementing said continuous counter when the phrase data selected last time and the phrase data selected this time agree and re-selecting the phrase data when a count value of said continuous counter is larger than a predetermined value;

(b) selecting one rhythm data from one kind of the rhythm pattern data stored in said rhythm-pattern storage area; and

(c) generating the BGM data from the phrase data selected by said step (a) and the rhythm data selected by said step (b).

9. A game apparatus that performs a BGM corresponding to at least a proceeding situation of a game, comprising:

a phrase data storage area that stores different kinds of a plurality of phrase data, based on a musical characteristic, wherein said phrase data designate a length and a pitch of a tone;

a rhythm-pattern storage area that stores at least one kind of rhythm pattern data, constructed of rhythm data, that designate a length in performance for performing a phrase and a timing of said phrase;

BGM-data reproducing programmed logic circuitry that reproduces BGM data constructed of at least one part;

a tone storage area that stores data of a sound output according to said BGM data;

a continuous counter for counting the number of times the same phrase has been selected;

phrase selecting programmed logic circuitry that randomly selects one kind of the phrase data stored in said phrase data storage area including incrementing said continuous counter when the phrase data selected last time and the phrase data selected this time agree and re-selecting the phrase data when a count value of said continuous counter is larger than a predetermined value;

rhythm-pattern selecting programmed logic circuitry that selects one rhythm data from one kind of the rhythm pattern data stored in said rhythm-pattern storage area according to a predetermined rule;

BGM generating programmed logic circuitry that generates said BGM data from the phrase data selected by said phrase selecting programmed logic circuitry and the rhythm data selected by said rhythm-pattern selecting programmed logic circuitry, and

sound outputting programmed logic circuitry that outputs the sound according to the BGM data reproduced by said BGM-data reproducing mechanism.

10. A method for generating a sequence of BGM, comprising the steps of:

providing at least one set of rhythm data;

providing at least one set of phrase data;

selecting a set of rhythm data from the at least one set of rhythm data;

selecting a set of phrase data from the at least one set of phrase data;

counting the number of times the currently selected set of phrase data has been continuously selected;

re-selecting a new set of phrase data if the currently selected phrase data has been continuously selected more than a predetermined number of times. and

generating BGM data from the selected rhythm data and the selected phrase data.

12. The method of claim 10, wherein the selecting a set of rhythm data includes randomly selecting a set of rhythm data.

13. The method of claim 10, wherein the selecting a set of rhythm data includes sequentially selecting a set of rhythm data.

14. The method of claim 10, wherein the selecting a set of phrase data includes randomly selecting a set of phrase data.

15. The method of claim 8, wherein the selecting a one rhythm data includes randomly selecting a rhythm data.

16. The method of claim 8, wherein the selecting a one rhythm data includes sequentially selecting a rhythm data.

(IX) **EVIDENCE APPENDIX**

None.

(X)   <u>RELATED PROCEEDINGS APPENDIX</u>

None.